CARL T.C. GUTIERREZ Magaflahi Governor

MADELEINE 2. BORDALLO Tinente Gunetnadora Lt Governor



Ufisinan Hinirat Abugao Hagatña, Guahan

Office of the Attorney General Hagatña, Guam

JOHN F. TARANTINO Hinirat Abugao Attorney General

ROBERT H. KONO Arkádi Sigundo Chief Deputy

GUAM LAW LIBRARY

December 15, 2000

Memorandum (Informational)

ReF: DPW 00-1234

To:

Director, Department of Public Works

From:

Attorney General MAN

Subject:

The erection of political signs on private property

Buenas yan Saluda! We are in receipt of your memorandum of December 1, 2000, in which you request information on the law respecting the erection of political signs on private property.

REQUEST:

Does the zoning law permit the erection of political signs on private property?

ANSWER:

Although the zoning law of Guam by its terms prohibits the erection of political signs on private property, under City of Ladue v. Gilleo our law is now unconstitutional to the extent it prohibits a private property owner from erecting at his own expense a political sign on his property. However, the zoning law does appear to validly prohibit the erection of signs by third parties for a fee and perhaps even without remuneration to the property owner.

STATEMENT OF FACTS:

Part 5 of Article 5, Chapter 61, Title 21, of the Guam Code Annotated (21 G.C.A. §§ 61542-61546) sets out the statutes of Guam that regulate signs. Section 61541 regulates the location and features of signs in general, and Section 61542 regulates political signs.

Section 61541 is the general sign law for Guam. We quote its first paragraph in full:

No structure of any kind or character erected or maintained for outdoor advertising or identification purposes, upon which any poster, bill, printing, painting, or other



Commonwealth Now!

Memo to Director, Department of Public Works December 15, 2000 Page 2

advertisement of any kind whatsoever is placed, including statuary for advertising or identification purposes, and no card, cloth, paper, metal, painted or wooden sign of any character placed for outdoor advertising or identification purposes, on or to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned, shall be placed or maintained on property adjacent to any highway, road, street, boulevard, lane, court, place, summons, trail, way, or other right of way or easement used for or laid out and intended for the public passage of vehicles or of vehicles and persons except as provided below:

The subsections of 61541 regulate the sorts of signs that can be erected in residential, agricultural, commercial, and industrial zones. We quote the provision for residential zones in full:

- (a) In Residential and Agricultural zones no exterior name plate or sign shall be erected, displayed, or maintained, except the following:
- (1) One non-moving, non-flashing sign for each family residing on the premises indicating the name of the resident or pertaining to a permitted occupation provided that each such sign does not exceed three (3) square feet in area.
- 2) One non-moving, non-flashing sign, not exceeding twelve (12) square feet in area, pertaining to permitted buildings, structures, and uses of the premises other than dwellings and occupations permitted therein.
- (3) Temporary unlighted signs aggregating not over twenty-four (24) square feet in area pertaining to the sale or lease of the premises.
- (4) Unlighted directional signs not exceeding three (3) square feet in area pertaining to churches, schools, institutions and other public or nonprofit uses.

Section 61542 allows the posting of political signs on government property. "Candidates for public office or other persons having an interest in an election may place political signs which advocate voting for or against candidates, or other matters to be considered by the electorate, on government property in accordance with the following provisions." Government property is "any tangible or real property held by the government of Guam," § 61542(a)(2). Political signs are "billboards, posters, banners or displays which advocate a candidate for political office or any matter to be presented to the electorate for vote," Section 61542(a)(4). The statute imposes various conditions upon their location on government property, time of display, and physical size, especially providing that political signs may not be erected earlier than ninety days before an election, § 61542(d), and may not exceed one hundred ninety-two square feet in surface area, § 61542(e).

Inasmuch as Section 61542 does not expressly prohibit the erection of political signs upon private property, the Department requests legal advice on whether Guam law permits the erection of political signs on private property.

DISCUSSION:

Section 61542 is the basic statute regulating the posting of political signs. It permits candidates for public office and organizations advocating the election of candidates to post signs upon government property. As this section does not prohibit the use of private property for displaying political signs, there is some doubt

Memo to Director, Department of Public Works December 15, 2000 Page 3

whether under this section the posting of political signs upon private property is unlawful. On the one hand, it could be argued that whatever is not prohibited by law is permitted. On the other, property is either private or public, and including public property within the zone of permitted areas could mean that it was intended to exclude private property. A reading of Section 61542 in isolation does not provide a clear answer.

The basic statute regulating signs in general is Section 61541. It is first to be noted that it regulates signs that are "placed or maintained on property adjacent to any highway, road, ..., or other right of way or easement used for or laid out and intended for the public passage of vehicles or of vehicles and persons." (Italics added.) The intention seems to be that only signs that are visible from a public highway are the to be regulated.

However, the Act must be read as a whole, and Section 61541 does appear to prohibit the erection of political signs upon private property. The principle underlying Section 61541 is that every sign on Guam that is "placed or maintained on property adjacent to any highway etc." shall be related to the use of the land upon which it is situated. For example, as provided in the above quotation, the law provides that signs in residential and agricultural districts may only state the identity of the resident or an lawful occupation. Signs that advertise the sale or lease of the land upon which it is posted are also permitted. Signs on private property seeking the election of a candidate or advocating a measure are in no way connected with the identity of the occupant, the use to which the land is being put, or the availability of the land for sale or lease. Section 61542 excepts political signs from the broad prohibition of Section 61541 by allowing their placement on government property. Since it must be presumed that the Legislature was fully aware that political signs do not come within the kinds of signs allowed by 61541(a), and it failed to include language allowing their placement on private property, we therefore conclude that it is the intention of the law that political signs not be erected upon private property.

Of course, any law that restricts political expression implicates the Free Speech Clause. Section 5(a) of the Organic Act (48 U.S.C. § 1421b(a)) provides that "no law shall be enacted in Guam . . . abridging the freedom of speech." The Fourteenth Amendment makes the First Amendment of the

U.S. Constitution applicable to the states, <u>Gitlow v. New York</u>, 268 U.S. 652, 45 S.Ct. 625 (1925). Therefore, the cases of the United States Supreme Court construing the Free Speech Guarantee must be consulted in order to determine the validity of Section 61541.

In <u>City of Ladue v. Gilleo</u>, 512 U.S. 43, 114 S.Ct. 2038 (1994) the United States Supreme Court held that the sign ordinance of Ladue was invalid under the Free Speech Clause. Like Sections 61541 and 61542, the Ladue ordinance prohibited all signs on residential property other than for-sale signs, residence identification signs, and the like. The city attempted to stop the display of a 8.5- by 11-inch sheet of paper bearing the words "For Peace in the Gulf." Gilleo had placed the sign in the second-story window of her home after persons unknown had removed a 24- by 36-inch sign that she had erected in her front yard. It read "Say No to War in the Persian Gulf, Call Congress Now."

The <u>Gilleo</u> opinion is the subject of criticism as departing from precedent but nonetheless must now be treated as current law on the subject. However, even under this opinion Guam's sign law may remain valid in part. The Court did not hold that the government has absolutely no authority to prohibit or limit the display of political signs on private property. In footnote 17 of its opinion the Court stated that "(n)or do we hold that

Memo to Director, Department of Public Works December 15, 2000 Page 4

every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban." 114 S.Ct. 2047 n. 17.

At a minimum then the Department has authority to enforce the existing height regulations of the zoning law. Although it has not done so for the reason that it intended that political signs not be permitted on private property, it would seem that the Legislature still has authority to enact a law regulating the physical dimensions and characteristics of political signs on private property. Further, we interpret footnote 17 of the opinion to mean that the Department can still enforce the current law against political signs on private property that were not erected by the landowner and/or are not owned by the landowner but were erected or owned by third parties, especially when the third-party erector or owner of the political sign remunerates the private landowner for allowing his or her land to be used as a platform.

It does not appear that the Department has authority to enter private property and summarily remove political signs that appear to be outside the scope of <u>Ladue v. Gilleo</u> and in violation of the sign law. The various summary remedies of Section 61542 assume that the offending political sign is on public property. Thus, the Department can only issue a Notice of Violation and refer the matter to the Criminal Prosecution Division of the Office of the Attorney General in cases of noncompliance, which will review the appropriateness of seeking their removal through judicial action. Any violation of the zoning law is deemed a petty misdemeanor, 21 G.C.A. § 61670.

This memorandum is for informational purposes only and is not an opinion of the Attorney General. For faster response to any questions about this memorandum, please include the above reference number.

Put Respetu.

OFFICE OF THE ATTORNEY GENERAL

Whonty Rman.

By:

MONTY R. MAY

Assistant Attorney General

F:VAG_DATA\Solicitor\DATA\MRM00123401.wpd\jla



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

>

Briefs and Other Related Documents

Supreme Court of the United States CITY OF LADUE, et al., Petitioners

v.
Margaret P. GILLEO.
No. 92-1856.

Argued Feb. 23, 1994. Decided June 13, 1994.

Resident sued city for permanent injunction to prohibit city from enforcing ordinance that banned all residential signs but those falling within one of ten exemptions. The United States District Court for the Eastern District of Missouri, 774 F.Supp. 1564, granted resident's motion for summary judgment. Following denial of city's motion to alter or amend judgment, 791 F.Supp. 240, resident filed application for prevailing party attorney fees and expenses. The District Court, 791 F.Supp. 238, granted motion. City appealed. The Court of Appeals, 986 F.2d 1180, affirmed as modified. Certiorari was granted. The Supreme Court, Justice Stevens, held that ordinance violated resident's free speech rights.

Affirmed.

Justice O'Connor filed concurring opinion.

West Headnotes

111 Constitutional Law \$\infty\$ 90.3

92k90.3 Most Cited Cases

There are two analytically distinct grounds for challenging constitutionality of municipal ordinance regulating display of signs: one is that measure in effect restricts too little speech because its exemptions discriminate on basis of signs' messages; alternatively, such provisions are subject to attack on ground that they simply prohibit too much protected speech. <u>U.S.C.A. Const. Amend. 1</u>.

[2] Constitutional Law \$\infty\$90(3)

92k90(3) Most Cited Cases

Regulation of speech may be impermissibly underinclusive: thus, exemption from otherwise permissible regulation of

speech may represent governmental attempt to give one side of debatable public question advantage in expressing its views to people; alternatively, through combined operation of general speech restriction and its exemptions, government might seek to select permissible subjects for public debate and thereby to control search for political truth. <u>U.S.C.A. Const. Amend. 1</u>.

[3] Constitutional Law \$\infty\$90.3

92k90,3 Most Cited Cases

[3] Municipal Corporations 602

268k602 Most Cited Cases

City ordinance banning all residential signs but those falling within one of ten exemptions violated homeowner's right to free speech; although city had concededly valid interest in minimizing visible clutter, it had totally foreclosed venerable means of communication to political, religious, or personal messages. <u>U.S.C.A. Const. Amend. 1</u>.

[4] Constitutional Law \$\infty\$90(3)

92k90(3) Most Cited Cases

Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, danger they pose to freedom of speech is readily apparent; by eliminating common means of speaking, such measures can suppress too much speech. <u>U.S.C.A. Const.Amend. 1</u>.

[5] Constitutional Law \$\infty\$ 90.3

92k90.3 Most Cited Cases

[5] Municipal Corporations © 602

268k602 Most Cited Cases

City ordinance banning all residential signs but those falling within one of ten exemptions could not be justified as "time, place, or manner restriction," as alternatives such as handbills or newspaper advertisements were inadequate substitutes for important medium that city had closed off; displaying sign from ones' own residence carries message quite distinct from displaying same sign someplace else, residential signs are unusually cheap and convenient form of communication, and audience intended to be reached by residential sign, i.e., neighbors, could not be reached nearly as well by other means. U.S.C.A. Const.Amend. 1.



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

[6] Constitutional Law 590.1(1)

92k90.1(1) Most Cited Cases

Special respect for individual liberty in home has long been part of our culture and our law; that principle has special resonance when government seeks to constrain person's ability to speak there. <u>U.S.C.A. Const. Amend. 1</u>.

**2039 Syllabus [FN*]

<u>FN*</u> The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v. Detroit Lumber Co.</u>, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

An ordinance of petitioner City of Ladue bans all residential signs but those falling within 1 of 10 exemptions, for the principal purpose of minimizing the visual clutter associated with such signs. Respondent Gilleo filed this action, alleging that the ordinance violated her right to free speech by prohibiting her from displaying a sign stating, "For Peace in the Gulf," from her home. The District Court found the ordinance unconstitutional, and the Court of Appeals affirmed, holding that the ordinance was a "content based" regulation, and that Ladue's substantial interests in enacting it were not sufficiently compelling to support such a restriction.

Held: The ordinance violates a Ladue resident's right to free speech. Pp. 2041-2047.

- (a) While signs pose distinctive problems and thus are subject to municipalities' police powers, measures regulating them inevitably affect communication itself. Such a regulation may be challenged on the ground that it restricts too little speech because its exemptions discriminate on the basis of signs' messages, or on the ground that it prohibits too much protected speech. For purposes of this case, the validity of Ladue's submission that its ordinance's various exemptions are free of impermissible content or viewpoint discrimination is assumed. Pp. 2041-2044.
- (b) Although Ladue has a concededly valid interest in minimizing visual clutter, it has almost completely foreclosed an important and distinct medium of expression to political, religious, or personal messages. Prohibitions foreclosing entire media may be completely free of content

or viewpoint discrimination, but such measures can suppress too much speech by eliminating a common means of speaking. Pp. 2044-2045.

- (c) Ladue's attempt to justify the ordinance as a "time, place, or manner" restriction fails because alternatives such as handbills and newspaper advertisements are inadequate substitutes for the important medium that Ladue has closed off. Displaying a sign from one's own residence carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, for it provides information about the speaker's identity, an important component of many attempts to persuade. Residential signs are also *44 an unusually cheap and convenient form of communication. Furthermore, the audience intended to be reached by a residential signneighbors--**2040 could not be reached nearly as well by other means. P. 2046.
- (d) A special respect for individual liberty in the home has long been part of this Nation's culture and law and has a special resonance when the government seeks to constrain a person's ability to speak there. The decision reached here does not leave Ladue powerless to address the ills that may be associated with residential signs. In addition, residents' self-interest in maintaining their own property values and preventing "visual clutter" in their yards and neighborhoods diminishes the danger of an "unlimited" proliferation of signs. P. 2047.

986 F.2d 1180 (CA8 1993), affirmed.

<u>STEVENS</u>, J., delivered the opinion for a unanimous Court. <u>O'CONNOR</u>, J., filed a concurring opinion, *post*, p. 2047.

Jordan B. Cherrick, for petitioners.

Gerald P. Greiman, for respondent.

<u>Paul Bender</u>, for the United States as amicus curiae, by special leave of the Court.

*45 Justice <u>STEVENS</u> delivered the opinion of the Court.

An ordinance of the City of Ladue prohibits homeowners from displaying any signs on their property except



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

"residence identification" signs, "for sale" signs, and signs warning of safety hazards. The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences. The question presented is whether the ordinance violates a Ladue resident's right to free speech. [FN1]

FN1. The First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press" The Fourteenth Amendment makes this limitation applicable to the States, see <u>Gitlow v. New York</u>, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), and to their political subdivisions, see <u>Lovell v. City of Griffin</u>, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

Ī

Respondent Margaret P. Gilleo owns one of the 57 single-family homes in the Willow Hill subdivision of Ladue. [FN2] On December 8, 1990, she placed on her front lawn a 24- by 36-inch sign printed with the words, "Say No to War in the Persian Gulf, Call Congress Now." After that sign disappeared, Gilleo put up another but it was knocked to the ground. When Gilleo reported these incidents to the police, they advised her that such signs were prohibited in Ladue. The city council denied her petition for a variance. [FN3] Gilleo then filed this action under 42 U.S.C. § 1983 against the City, the mayor, and members of the city council, alleging that *46 Ladue's sign ordinance violated her First Amendment right of free speech.

<u>FN2.</u> Ladue is a suburb of St. Louis, Missouri. It has a population of almost 9,000, and an area of about 8.5 square miles, of which only 3% is zoned for commercial or industrial use.

<u>FN3.</u> The ordinance then in effect gave the city council the authority to "permit a variation in the strict application of the provisions and requirements of this chapter ... where the public interest will be best served by permitting such variation." App. 72.

The District Court issued a preliminary injunction against enforcement of the ordinance. 774 F.Supp. 1559

(E.D.Mo.1991). Gilleo then placed an 8.5- by 11-inch sign in the second story window of her home stating, "For Peace in the Gulf." The Ladue City Council responded to the injunction by repealing its ordinance and enacting a replacement. [FN4] Like its predecessor, the new ordinance contains a general prohibition of "signs" and defines that term broadly. [FN5] The **2041 ordinance prohibits all signs except those that fall within 1 of 10 exemptions. Thus, "residential identification signs" no larger than one square foot are allowed, as are signs advertising "that the property is for sale, lease or exchange" and identifying the owner or agent. § 35-10, App. to Pet. for Cert. 45a. Also exempted are signs "for churches, religious institutions, and schools," § 35-5, id., at 41a, "[c]ommercial signs in commercially zoned or industrial zoned districts," § 35-4, ibid., and on-site signs advertising "gasoline filling *47 stations," [FN6] § 35-6, id., at 42a. Unlike its predecessor, the new ordinance contains a lengthy "Declaration of Findings, Policies, Interests, and Purposes," part of which recites that the

<u>FN4.</u> The new ordinance eliminates the provision allowing for variances and contains a grandfather clause exempting signs already lawfully in place.

FN5. Section 35-2 of the ordinance declares that "No sign shall be erected [or] maintained" in the City except in conformity with the ordinance; § 35-3 authorizes the City to remove nonconforming signs. App. to Pet. for Cert. 40a. Section 35-1 defines "sign" as:

"A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word 'sign' shall also include 'banners', 'pennants', 'insignia', 'bulletin boards', 'ground signs', 'billboard', 'poster billboards', 'illuminated signs', 'projecting signs', 'temporary signs', 'marquees', 'roof signs', 'yard signs', 'electric signs', 'wall signs', 'temporary, 'wall signs', 'wall signs', 'wall signs', 'wall signs', 'wall signs', 'wall signs', 'ground sig



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

and 'window signs', wherever placed out of doors in view of the general public or wherever placed indoors as a window sign." *Id.*, at 39a.

FN6. The full catalog of exceptions, each subject to special size limitations, is as follows: "[M]unicipal signs"; "[s]ubdivision and residence identification" signs; "[r]oad signs and driveway signs for danger, direction, or identification"; "[h]ealth inspection signs"; "[s]igns for churches, religious institutions, and schools" (subject to regulations set forth in § 35-5); "identification signs" for other not-for-profit organizations; signs "identifying the location of public transportation stops"; "[g]round signs advertising the sale or rental of real property," subject to the conditions, set forth in § 35-10, that such signs may "not be attached to any tree, fence or utility pole" and may contain only the fact of proposed sale or rental and the seller or agent's name and address or telephone number; "[c]ommercial signs in commercially zoned or industrial zoned districts," subject to restrictions set out elsewhere in the ordinance; and signs that "identif[y] safety hazards." § 35-4, id., at 41a, 45a.

"proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children." *Id.*, at 36a.

Gilleo amended her complaint to challenge the new ordinance, which explicitly prohibits window signs like hers. The District Court held the ordinance unconstitutional, 774 F.Supp. 1559 (ED Mo.1991), and the Court of Appeals affirmed, 986 F.2d 1180 (CA8 1993). Relying on the plurality opinion in Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court of Appeals held the ordinance invalid as a "content based" regulation because the City treated commercial speech more favorably than noncommercial speech and favored some

kinds of noncommercial speech over others. *48 986 F.2d. at 1182. Acknowledging that "Ladue's interests in enacting its ordinance are substantial," the Court of Appeals nevertheless concluded that those interests were "not sufficiently 'compelling' to support a content-based restriction." *Id.*, at 1183-1184 (citing *Simon & Schuster, Inc. y. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991)).

We granted the City of Ladue's petition for certiorari, <u>510</u> <u>U.S. 809, 114 S.Ct. 55, 126 L.Ed.2d 24 (1993)</u>, and now affirm.

II

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs--just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. See, e.g., **2042 Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

In <u>Linmark Associates</u>, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), we addressed an ordinance that sought to maintain stable, integrated neighborhoods by prohibiting homeowners from placing "For Sale" or "Sold" signs on their property. Although we recognized the importance of Willingboro's objective, we held that the First Amendment prevented the township from "achieving its goal by restricting the free flow of truthful information." <u>Id.</u> at 95, 97 S.Ct. at 1619. In some respects <u>Linmark</u> is the mirror image of this case. For instead of prohibiting "For Sale" signs without banning any other *49 signs, Ladue has exempted such signs from an otherwise virtually complete ban. Moreover, whereas in <u>Linmark</u> we



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

noted that the ordinance was not concerned with the promotion of esthetic values unrelated to the content of the prohibited speech, <u>id.</u> at 93-94, 97 S.Ct., at 1618-1619, here Ladue relies squarely on that content-neutral justification for its ordinance.

In Metromedia, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising "on-site" activities. [FN7] The Court concluded that the city's interest in traffic safety and its esthetic interest in preventing "visual clutter" could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed. 453 U.S., at 511-512, 101 S.Ct., at 2894-2895. [FN8] Nevertheless, the Court's judgment in Metromedia, supported by two different lines of reasoning, invalidated the San Diego ordinance in its entirety. According to Justice White's plurality opinion, the ordinance impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. Id. at 514-515, 101 S.Ct., at 2896-2897. On *50 the other hand, Justice Brennan, joined by Justice BLACKMUN, concluded that "the practical effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication" for noncommercial messages, and that the city had failed to make the strong showing needed to justify such "content-neutral prohibitions of particular media of communication." Id., at 525-527, 101 S.Ct., at 2902. The three dissenters also viewed San Diego's ordinance as tantamount to a blanket prohibition of billboards, but would have upheld it because they did not perceive "even a hint of bias or censorship in the city's actions" nor "any reason to believe that the overall communications market in San Diego is inadequate." Id., at 552-553, 101 S.Ct., at 2915-2916 (STEVENS, J., dissenting in part). See also **2043id. at 563, 566, 101 S.Ct., at 2921, 2922-2923 (Burger, C.J., dissenting); id., at 569-570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting).

FN7. The San Diego ordinance defined "on-site signs" as "those 'designating the name of the owner or occupant of the premises upon which such signs

are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed.' "Metromedia, Inc. v. San Diego. 453 U.S., at 494, 101 S.Ct., at 2885. The plurality read the "on-site" exemption of the San Diego ordinance as inapplicable to non-commercial messages. See id., at 513, 101 S.Ct., at 2895. Cf. id., at 535-536, 101 S.Ct., at 2906-2907 (Brennan, J., concurring in judgment). The ordinance also exempted 12 categories of displays, including religious signs; for sale signs; signs on public and commercial vehicles; and "'[t]emporary political campaign signs.' " Id., at 495, n. 3, 101 S.Ct., at 2886, n. 3

FN8. Five Members of the Court joined Part IV of Justice White's opinion, which approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. See *id.* at 541, 101 S.Ct., at 2909-2910 (STEVENS, J., dissenting in part) (joining Part IV); *id.* at 564-565, 101 S.Ct., at 2921-2922 (Burger, C.J., dissenting); *id.*, at 570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting).

In Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), we upheld a Los Angeles ordinance that prohibited the posting of signs on public property. Noting the conclusion shared by seven Justices in Metromedia that San Diego's "interest in avoiding visual clutter" was sufficient to justify a prohibition of commercial billboards, 466 U.S., at 806-807, 104 S.Ct., at 2130 in Vincent we upheld the Los Angeles ordinance, which was justified on the same grounds. We rejected the argument that the validity of the city's esthetic interest had been compromised by failing to extend the ban to private property, reasoning that the "private citizen's interest in controlling the use of his own property justifies the disparate treatment." Id., at 811, 104 S.Ct., at 2132. We also rejected as "misplaced" respondents' reliance on public forum principles, for they had "fail[ed] to demonstrate the existence of a traditional right of access



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

respecting such items as utility poles ... comparable to that recognized for public streets and parks." <u>Id.</u>, at 814, 104 S.Ct., at 2133.

[1] These decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in *51 effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. See Metromedia, 453 U.S., at 512-517, 101 S.Ct., at 2895-2897 (opinion of White, J.). Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. See id., at 525-534, 101 S.Ct., at 2901-2906 (Brennan, J., concurring in judgment). The City of Ladue contends, first, that the Court of Appeals' reliance on the former rationale was misplaced because the City's regulatory purposes are content neutral, and, second, that those purposes justify the comprehensiveness of the sign prohibition. A comment on the former contention will help explain why we ultimately base our decision on a rejection of the latter.

Ш

[2] While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. [FN9] Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." First Nat. Bank of Boston v. Bellotti. 435 U.S. 765, 785-786, 98 S.Ct. 1407, 1420-1421. 55 L.Ed.2d 707 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control ... the search for political truth." Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 538, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980). [FN10]

FN9. Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause. See, *e.g.*, *Carey v. Brown*, 447 U.S. 455, 459-471, 100 S.Ct. 2286, 2289- 2296, 65 L.Ed.2d 263 (1980)

(ordinance that forbade certain kinds of picketing but exempted labor picketing violated Clause); *Police Dept. of Chicago v. Moslev.* 408 U.S. 92, 98-102, 92 S.Ct. 2286, 2291-2294, 33 L.Ed.2d 212 (1972) (same).

FN10. Of course, not every law that turns on the content of speech is invalid. See generally Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 79 (1978). See also <u>Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.</u> 447 U.S., at 545, and n. 2, 100 S.Ct., at 2237 and n. 2 (STEVENS, J., concurring in judgment).

*52 The City argues that its sign ordinance implicates neither of these concerns, and that the Court of Appeals therefore erred in demanding a "compelling" justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among **2044 the side effects of various kinds of signs. These differences are only adventitiously connected with content, and supply a sufficient justification, unrelated to the City's approval or disapproval of specific messages, for carving out the specified categories from the general ban. See Brief for Petitioners 18-23. Thus, according to the Declaration of Findings, Policies, Interests, and Purposes supporting the ordinance, the permitted signs, unlike the prohibited signs, are unlikely to contribute to the dangers of "unlimited proliferation" associated with categories of signs that are not inherently limited in number. App. to Pet. for Cert. 37a. Because only a few residents will need to display "for sale" or "for rent" signs at any given time, permitting one such sign per marketed house does not threaten visual clutter. Ibid. Because the City has only a few businesses, churches, and schools, the same rationale explains the exemption for on-site commercial and organizational signs. Ibid. Moreover, some of the exempted categories (e.g., danger signs) respond to unique public needs to permit certain kinds of speech. Ibid. Even if we assume the validity of these arguments, the exemptions in Ladue's ordinance nevertheless shed light on the separate question whether the ordinance prohibits too much speech.

Exemptions from an otherwise legitimate regulation of a

114 S.Ct. 2038

512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place. See, e.g., *53 Cincinnati v. Discovery Network. Inc.. 507 U.S. 410, 424-426, 113 S.Ct. 1505, 1514-1515, 123 L.Ed.2d 99 (1993). In this case, at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's esthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.

Under the Court of Appeals' content discrimination rationale, the City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property; she asserts a constitutional right to display an antiwar sign at her own home. Therefore, we first ask whether Ladue may properly prohibit Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to permit certain other signs. In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination. [FN11]

FN11. Because we set to one side the content discrimination question, we need not address the City's argument that the ordinance, although speaking in subject-matter terms, merely targets the "undesirable secondary effects" associated with certain kinds of signs. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986). The inquiry we undertake

below into the adequacy of alternative channels of communication would also apply to a provision justified on those grounds. See <u>id.</u> at 50, 106 S.Ct., at 930.

*54 IV

[3] In *Linmark* we held that the city's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." 431 U.S., at 93, 97 S.Ct., at 1618. Ladue's sign ordinance is supported principally by the City's interest in **2045 minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in *Linmark*. Moreover, whereas the ordinance in *Linmark* applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in *Linmark*. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly. A prohibition is not always invalid merely because it applies to a sizeable category of speech; the sign ban we upheld in *Vincent*, for example, was quite broad. But in *Vincent* we specifically noted that the category of speech in question--signs placed on public property--was not a "uniquely valuable or important mode of communication," and that there was no evidence that "appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression." 466 U.S., at 812, 104 S.Ct., at 2133.

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. *55 Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they

	 	 The second secon	

512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

are displayed to signal the resident's support for particular candidates, parties, or causes. [FN12] They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

FN12. "[S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate--an impact that money can't buy." D. Simpson, Winning Elections: A Handbook in Participatory Politics 87 (rev. ed. 1981).

[4] Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, Lovell v. City of Griffin, 303 U.S. 444, 451-452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938); handbills on the public streets, Jamison v. Texas, 318 U.S. 413, 416, 63 S.Ct. 669, 672, 87 L.Ed. 869 (1943); the door-to-door distribution of literature, Martin v. City of Struthers, 319 U.S. 141, 145-149, 63 S.Ct. 862. 864-866, 87 L.Ed. 1313 (1943); Schneider v. State (Town of Irvington), 308 U.S. 147, 164-165, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939), and live entertainment, Schad v. Mount Ephraim, 452 U.S. 61, 75-76, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671 (1981). See also Frishv v. Schultz, 487 U.S. 474, 486, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988) (picketing focused upon individual residence is "fundamentally different from more generally directed means of communication that may not be completely banned in residential areas"). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech. [FN13]

FN13. See Stone. Content-Neutral Restrictions. 54 U.Chi.L.Rev. 46, 57-58 (1987):

"[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to

communicate their views to others.... To ensure 'the widest possible dissemination of information [,]' [Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945),] and the 'unfettered interchange of ideas,' [Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957),] the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression."

**2046 5 *56 Ladue contends, however, that its ordinance is a mere regulation of the "time, place, or manner" of speech because residents remain free to convey their desired messages by other means, such as *hand-held* signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." Brief for Petitioners 41. However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. [FN14] A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed *57 on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

114 S.Ct. 2038

512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

FN14. See Aristotle 2, Rhetoric, Book 1, ch. 2, in 8 Great Books of the Western World, Encyclopedia Brittanica 595 (M. Adler ed., 2d ed. 1990) ("We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided").

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Cf. Vincent, 466 U.S., at 812-813, n. 30, 104 S.Ct., at 2132-2133, n, 30; Anderson v, Celebrezze, 460 U.S. 780, 793-794, 103 S.Ct. 1564, 1572-1573, 75 L.Ed.2d 547 (1983); Martin v. City of Struthers, 319 U.S., at 146, 63 S.Ct., at 865; Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293, 61 S.Ct. 552, 555, 85 L.Ed. 836 (1941). Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. [FN15] Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means. [FN16]

> FN15. The precise location of many other kinds of signs (aside from "on-site" signs) is of lesser For example, communicative importance. assuming the audience is similar, a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another. The elimination of a cheap and handy medium of expression is especially apt to deter individuals from communicating their views to the public, for unlike businesses (and even political organizations) individuals generally realize few tangible benefits from such communication. Cf. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council. Inc., 425 U.S. 748, 772, n. 24, 96 S.Ct. 1817, 1831, n. 24, 48 L.Ed.2d 346 (1976) ("Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone

entirely").

FN16. Counsel for Ladue has also cited flags as a viable alternative to signs. Counsel observed that the ordinance does not restrict flags of any stripe, including flags bearing written messages. See Tr. of Oral Arg. 16, 21 (noting that rectangular flags, unlike "pennants" and "banners," are not prohibited by the ordinance). Even assuming that flags are nearly as affordable and legible as signs, we do not think the mere possibility that another medium could be used in an unconventional manner to carry the same messages alters the fact that Ladue has banned a distinct and traditionally important medium of expression. See, e.g., Schneider v. State (Town of Irvington), 308 U.S. 147, 163, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939).

**2047 [6] *58 A special respect for individual liberty in the home has long been part of our culture and our law, see, e.g., Payton v. New York, 445 U.S. 573, 596-597, and nn. 44-45, 100 S.Ct. 1371, 1385-1386, and nn. 44-45, 63 L.Ed.2d 639 (1980); that principle has special resonance when the government seeks to constrain a person's ability to speak there. See Spence v. Washington, 418 U.S. 405, 406, 409, 411, 94 S.Ct. 2727, 2728, 2729-2730, 41 L.Ed.2d 842 (1974) (per curiam). Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, see Cox v. New Hampshire, 312 U.S. 569, 574, 576, 61 S.Ct. 762, 765, 765, 85 L.Ed. 1049 (1941); see also Widmar v. Vincent, 454 U.S. 263, 278, 102 S.Ct. 269, 278-279, 70 L.Ed.2d 440 (1981) (STEVENS, J., concurring in judgment), its need to regulate temperate speech from the home is surely much less pressing, see Spence. 418 U.S., at 409, 94 S.Ct., at 2729-2730.

Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs. [FN17] It bears mentioning that individual



512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

residents themselves have strong incentives to keep their own property values up and to prevent "visual clutter" in their own yards and neighborhoods--incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property. Residents' self-interest diminishes the danger of the "unlimited" proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs *59 without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

FN17. Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice O'CONNOR, concurring.

It is unusual for us, when faced with a regulation that on its face draws content distinctions, to "assume, arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination." Ante, at 2044. With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-116, 112 S.Ct. 501, 507-508, 116 L.Ed.2d 476 (1991). The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny. See, e.g., Burson v. Freeman, 504 U.S. 191, 197-198, 112 S.Ct. 1846, 1850-1851, 119 L.Ed.2d 5 (1992) (plurality opinion); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133-135, 112 S.Ct. 2395, 2403-2404, 120 L.Ed.2d 101 (1992); Simon & Schuster, supra, at 115-116, 112 S.Ct., at 507-508; Boos v. Barry, 485 U.S. 312, 318-321, 108 S.Ct. 1157, 1162-1164, 99 L.Ed.2d 333 (1988) (plurality opinion); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-231, 107 S.Ct. 1722, 1727-1729, 95 L.Ed.2d 209 (1987); Carev v. Brown, 447 U.S. 455, 461-463, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 92 S.Ct. 2286, 2289-2290, 2291-2292, 33 L.Ed.2d 212 (1972).

Over the years, some cogent criticisms have been leveled at our approach. See, e.g., **2048 R.A.V. v. St. Paul. 505 U.S. 377, 420-422, 112 S.Ct. 2538, 2563-2564, 120 L.Ed.2d 305 (1992) (STEVENS, J., concurring in judgment); Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 544-548, 100 S.Ct. 2326, 2337-2339, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in judgment); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo.L.J. 727 (1980); *60 Stephan, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203 (1982). And it is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. The content distinctions present in this ordinance may, to some, be a good example of this.

But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. See *Hustler Magazine, Inc. v. Falwell.* 485 U.S. 46, 52-53, 108 S.Ct. 876, 880-881, 99 L.Ed.2d 41 (1988). On a theoretical level, it reflects important insights into the meaning of the free speech principle--for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. See, *e.g., ante,* at 2043-2044; *Mosley, supra,* 408 U.S., at 95, 92 S.Ct., at 2289-2290: Stone, Content Regulation and the First Amendment, 25 Win. & Mary L.Rev. 189 (1983). On a practical level, it has in application generally led to

114 S.Ct. 2038

512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

(Cite as: 512 U.S. 43, 114 S.Ct. 2038)

seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.

I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations. Perhaps this would have forced us to confront some of the difficulties with the existing doctrine; perhaps it would have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.

Nonetheless, I join the Court's opinion, because I agree with its conclusion in Part IV that even if the restriction were content neutral, it would still be invalid, and because I do not think Part III casts any doubt on the propriety of our normal content discrimination inquiry.

512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

Briefs and Other Related Documents (Back to top)

- <u>1994 WL 663434</u> (Oral Argument) Oral Argument (Feb. 23, 1994)
- <u>1994 WL 249263</u> (Appellate Brief) REPLY BRIEF FOR THE PETITIONERS (Jan. 04, 1994)
- <u>1993 WL 639376</u> (Appellate Brief) BRIEF FOR RESPONDENT (Dec. 14, 1993)
- <u>1993 WL 639378</u> (Appellate Brief) BRIEF FOR THE PETITIONERS (Nov. 15, 1993)

END OF DOCUMENT

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

Supreme Court of the United States. GITLOW

v.

PEOPLE OF THE STATE OF NEW YORK.
No. 19.

Reargued Nov. 23, 1923. Decided June 8, 1925.

In Error to the Supreme Court of the State of New York.

Benjamin Gitlow was convicted of statutory crime of criminal anarchy. To review a judgment of the Court of Appeals of New York (234 N. Y. 132, 136 N. E. 317; 234 N. Y. 539, 138 N. E. 438), affirming a judgment of the Appellate Division (195 App. Div. 773, 187 N. Y. S. 783). he brings error. Judgment affirmed.

West Headnotes

Insurrection and Sedition 2

218k2 Most Cited Cases

New York statute defining criminal "anarchy" and prohibiting its "advocacy" is valid.

Constitutional Law \$\infty\$ 48(5)

92k48(5) Most Cited Cases

(Formerly 92k48)

State is primary judge of necessity for regulations, and great weight must be accorded its determination that certain police regulations are necessary.

Constitutional Law € 48(1)

92k48(1) Most Cited Cases

(Formerly 92k48)

Every presumption is indulged in favor of validity of legislative act.

Constitutional Law € 70.3(1)

92k70.3(1) Most Cited Cases

(Formerly 92k70(3))

Whether utterances coming within prohibited class is likely to bring about evil sought to be avoided is not open to consideration.

Constitutional Law 5 81

92k81 Most Cited Cases

Constitutional Law \$\infty\$=90.1(2)

92k90.1(2) Most Cited Cases

(Formerly 92k90)

State may punish utterances endangering government, and need not await immediate danger.

Constitutional Law 50(3)

92k90(3) Most Cited Cases

(Formerly 92k90)

Right of free speech is not absolute right to speech without responsibility, and under police power state may punish utterances inimical to public welfare.

Constitutional Law €==90(3)

92k90(3) Most Cited Cases

(Formerly 92k90)

Under police power, state may punish abuses of freedom of speech and press by utterances inimical to public welfare or morals.

Constitutional Law € 90.1(2)

92k90.1(2) Most Cited Cases

(Formerly 92k90)

New York statute defining criminal "anarchy" and prohibiting its "advocacy" *held* not violative of constitutional guaranty of freedom of speech or press or of liberties guaranteed by Amendment 14.

**625 *653 Messrs. Walter H. Pollak and Walter Nelles, both of New York City, for plaintiff in error.

Messrs. John Caldwell Myers, of New York City, and W. J. Wetherbee and Claude T. Dawes, both of Albany, N. Y., for the People of the State of New York.

*654 Mr. Justice SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Law, §§ 160, 161. [FN1] He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. People v. Gitlow, 195 App. Div.



268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

773, 187 N. Y. S. 783; 234 N. Y. 132, 136 N. E. 317; and 234 N. Y. 529, 138 N. E. 438. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703, 43 S. Ct. 163, 67 L. Ed. 472.

FN1 Laws 1909, c. 88; Consol. Laws 1909, c. 40. This statute was originally enacted in 1902. Laws 1902, c. 371.

**626 The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

'Sec. 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assessination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

'Sec. 161. Advocacy of Criminal Anarchy. Any person who:

- '1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
- '2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any *655 form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means, * * *

'Is guilty of a felony and punishable' by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled 'The Left Wing Manifesto'; the second that he had printed, published and knowingly circulated and distributed a certain paper called 'The Revolutionary Age,' containing the writings set

forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of 'moderate Socialism.' Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a 'Manifesto.' This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand *656 copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the head quarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that 'he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for the circulation.'

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

Extracts from the Manifesto are set forth in the margin. [FN2] Coupled with a review of **627 the rise of Socialism, it *657 condemned the dominant 'moderate Socialism' for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism,' based on 'the class struggle' and mobilizing *658 the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revoluntionary dictatorship of the proletariat,' the system of Communist Socialism. The then recent strikes **628 in Seattle and Winnipeg [FN3] were cited as instances of a development already verging on revolutionary action and suggestive of proletarian *659 dictatorship, in which the strike-workers were 'trying to usurp the functions of municipal government'; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

FN2 'The Left Wing Manifesto.*

'Issued on Authority of the Conference by the National Council of the Left Wing.

'The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. * * * Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. * * * The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. * * * The dominant Socialism united with the capitalist governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. * * * [The] proletaiat, urging on the

It nower. peasantry, conquered poorer accomplished a proletarian revolution by means of the Bolshevik policy of 'all power to the Soviets,'--organizing the new transitional state of proletarian dictatorship. * * * Moderate Socialism bourgeois, democratic that the affirms parliamentary state is the necessary basis for the introduction of Socialism. * * * Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. * * * Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action proletarian dictatorship. * * * Imperialism is dominant in the United States, which is now a world power. * * * The war has aggrandized American Capitalism, instead stead of weakening it as in Europe. * * * These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. * * * are developing which verge on revolutionary action, and which the suggestion of apparent, dictatorship is proletarian striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. * * * These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles of the proletariat, engage directly in emphasizing struggles while these revolutionary purposes of Socialism and the

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. * * * Our task * * * is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. * * * Revolutionary Socialism adheres to the class struggle because through the class struggle alone--the mass struggle--can industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle * * * in the sense that its objective is political--the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. * * * It proposes to conquer by means of political action * * * in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the class action of the proletariat in any form having as its objective the conquest of the power of of the state. * * * Parliamentary action which emphasizes the implacable character of the class struggles is an indispensable means of agitation. * * * But parliamentarism cannot conquer the power of the state for the proletariat. * * * It is accomplished, not by the legislative representatives of the proletariat, but by the mass power of the proletariat in action. The supreme power of the proletariat inheres in the political mass strike, in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is the political mass strike. * * * The power of the proleatariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the burgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. * * * The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action purpose while political in extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. * * * The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. * * * It is therefore necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoisie. * * * Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. * * * The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is that state alone, functioning as a dictatorship of the proletariat, that can realize Socialism. * * * While the dictatorship of the proletariat proforms its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the

Page 5

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure Socialism, -- industrial Communist self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. * * * It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society--the struggle for these--is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!'

* Italics are given as in the original, but the paragraphing is omitted.

FN3 There was testimony at the trial that 'there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed.'

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the *660 indictment on the grounds that, as a matter of law, the Manifesto 'is not

in contravention of the statute,' and that 'the statute is in contravention of' the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal 'on the grounds stated in the first objection to evidence,' *661 and again on the grounds that 'the indictment does not charge an offense' and the evidence 'does not show an offense.' These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising the advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing 'some definite or immediate act or acts' or force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be 'reasonably and ordinarily calculated to incite certain persons' to acts of force, violence or unlawfulness, *662 with the object of overthrowing organized government. These were also denied.

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the Revolutionary Age, said: [FN4]

FN4 People v. Gitlow. 195 App. Div. 773, 782, 790, 187 N. Y. S. 783, 791.

'It is perfectly plain that the plan and purpose advocated * * * contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, * * * but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. * * * The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown. * * * *

The Court of Appeals held that the Manifesto 'advocated the overthrow of this government by violence, or by unlawful means.' [FN5] In one of the opinions representing *663 the views of a majority of the court, [FN6] it was said:

FN5 Five judges, constituting the majority of the court, agreed in this view. People v. Gitlow. 234 N. Y. 132, 138, 136 N. E. 317, 320. And the two judges, constituting the minority--who dissented solely on a question as to the construction of the statute which is not here involved-- said in reference to the Manifesto: 'Revolution for the purpose of overthrowing the present form and the established political system of the United States

government by direct means rather than by constitutional means is therein clearly advocated and defended * * * * p. 154 (136 N. E. 326).

FN6 Pages 141, 142 (136 N. E. 320).

'It will be seen * * * that this defendant through the Manifesto * * * advocated the destruction of the state and the establishment of the dictatorship of the proletariat. * * * To advocate * * * the commission of this conspiracy or action by mass strike whereby government is cripped, the administration **629 of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means.'

In the other [FN7] it was said:

FN7 Pages 149, 150 (136 N. E. 324).

'As we read this Manifesto * * * we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism' and 'in regarding it as a justification and advocacy of action by one class which would destory the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of * * * force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described.'

And both the Appellate Division and the Court of Appeals held the statute constitutional.

The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out. [FN8] The correctness of the verdict is not *664 questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of 'doctrine'

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable 'in circumstances involving likelihood of substantive evil,' the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the 'liberty' protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2d, That while liberty of expression 'is not absolute,' it may be restrained 'only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely,' and as the statute 'takes no account of circumstances,' it unduly restrains this liberty and is therefore unconstitutional.

 $\underline{FN8}$ Exceptions to all of these rulings had been duly taken.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching *665 the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.' It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that:

'A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy,

advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. * * *

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

'The proletariat revolution and the Communist reconstruction of society--the struggle for these--is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle!'

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial *666 revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, **630 and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

statement in <u>Prudential Ins. Co. v. Cheek. 259 U. S. 530.</u> 543. 42 S. Ct. 516, 66 L. Ed. 1044, 27 A. L. R. 27, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question. [FN9]

FN9 Compare Patterson v. Colorado. 205 U. S. 454. 462. 27 S. Ct. 556. 51 L. Ed. 879. 10 Ann. Cas. 689; Twining v. New Jersey. 211 U. S. 78. 108. 29 S. Ct. 14. 53 L. Ed. 97; Coppage v. Kansas. 236 U. S. 1. 17. 35 S. Ct. 240. 59 L. Ed. 441. L. R. A. 1915C. 960; Fox v. Washington. 236 U. S. 273. 276. 35 S. Ct. 383. 59 L. Ed. 573; Schaefer v. United States. 251 U. S. 466. 474. 40 S. Ct. 259. 64 L. Ed. 360; Gilbert v. Minnesota. 254 U. S. 325. 338. 41 S. Ct. 125. 65 L. Ed. 287; Meyer v. Nebraska. 262 U. S. 390. 399. 43 S. Ct. 625. 67 L. Ed. 1042. 29 A. L. R. 1446; 2 Story on the Constitution, 5th Ed., § 1950, p. 698.

[1] It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution (5th Ed.) § 1580, p. 634; Robertson v. Baldwin. 165 U. S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; Patterson v. Colorado, 205 U. S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; *667Fox v. Washington, 236 U. S. 273, 276, 35 S. Ct. 383, 59 L. Ed. 573; Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 206, 39 S. Ct. 249, 63 L. Ed. 561; Debs v. United States, 249 U. S. 211, 213, 39 S. Ct. 252, 63 L. Ed. 566; Schaefer v. United States, 251 U. S. 466, 474, 40 S. Ct. 259, 64 L. Ed. 360; Gilbert v. Minnesota, 254 U. S. 325, 332, 41 S. Ct. 125, 65 L. Ed. 287; Warren v. United States, 183 F. 718, 721, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

[2] That a State in the exercise of its police power may

punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. Robertson v. Baldwin, supra, p. 281 (17 S. Ct. 326); Patterson v. Colorado, supra, p. 462 (27 S. Ct. 556); Fox v. Washington, supra, p. 277 (35 S. Ct. 383); Gilbert v. Minnesota, supra, p. 339 (41 S. Ct. 125); People v. Most, 171 N. Y. 423, 431, 64 N. E. 175, 58 L. R. A. 509; State v. Holm, 139 Minn, 267, 275, 166 N. W. 181, L. R. A. 1918C. 304; State v. Hennessy, 114 Wash. 351, 359, 195 P. 211; State v. Boyd, 86 N. J. Law, 75, 79, 91 A. 586; State v. McKee, 73 Conn. 18, 27, 46 A, 409, 49 L, R, A, 542, 84 Am. St. Rep. 124. Thus it was held by this Court in the Fox Case, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

[3] And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story, supra, does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *668State v. Holm. supra. p. 275 (166 N. W. 181). It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. People v. Most. supra. pp. 431, 432 (64 N. E. 175). And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. People v. Lloyd, 304 111. 23. 34, 136 N. E. 505. See, also, State v. Tachin, 92 N. J. Law, 269, 274, 106 A. 145, and People v. Steelik, 187 Cal. 361, 375, 203 P. 78. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

be denied. <u>Turner v. Williams. 194 U. S. 279, 294, 24 S. Ct. 719, 48 L. Ed. 979.</u> In <u>Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 38 S. Ct. 560, 564 (62 L. Ed. 1186)</u>, it was said:

'The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.'

**631 [4][5] By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler v. Kansas, 123 U. S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205. And the case is to be considered 'in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare'; and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable *669 attempts to exercise authority vested in the State in the public interest.' Great Northern Ry, v. Clara City, 246 U. S. 434, 439, 38 S. Ct. 346, 347 (62 L. Ed. 817). That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd, supra, p. 35 (136 N. E. 512), it was aptly said:

'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there *670 would be neither prosecuting officers nor courts for the enforcement of the law.'

[6] We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

[7] This being so it may be applied to every utterance--not too trivial to be beneath the notice of the law--which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in Fox v. Washington, supra, p. 277 (35 S. Ct. 383); Abrams v. United States, 250 U. S. 616, 624, 40 S. Ct. 17, 63 L. Ed. 1173; Schaefer v. United States, supra. pp. 479, 480 (40 S. Ct. 259); Pierce v. United States, 252 U. S. 239, 250, 251, 40 S. Ct. 205, 64 L. Ed. 542, [FN10] and Gilbert v. Minnesota, supra, p. 333 (41 S. Ct. 125). In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

FN10 This reference is to so much of the decision



268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language *671 used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such case it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which **632 the legislative body might prevent. Schenck v. United States, supra, p. 51 (39 S. Ct. 247); Debs v. United States, supra, pp. 215, 216 (39 S. Ct. 252). And the general statement in the Schenck Case, p. 52 (39 S. Ct. 249) that the 'question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,'--upon which great reliance is placed in the defendant's argument--was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that,

applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated 'some definite or immediate act or acts' of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should *672 have been advocated. Nor was it necessary that the language should have been 'reasonably and ordinarily calculated to incite certain persons' to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. Queen v. Most, L. R. 7 Q. B. D. 244.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, [FN11] to which reference is made in the defendant's brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.

FN11 Stat. 596.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

Affirmed.

Mr. Justice HOLMES (dissenting).

Mr. Justice BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in Schenck v. United States.

45 S.Ct. 625

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

(Cite as: 268 U.S. 652, 45 S.Ct. 625)

249 U. S. 47, 52, 39 S. Ct. 247, 249 (63 L. Ed. 470), applies:

'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive *673 evils that [the State] has a right to prevent.'

It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U. S. 616, 40 S. Ct. 17, 63 L. Ed. 1173, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259, 64 L. Ed. 360, have settled the law. If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

END OF DOCUMENT